780 376 79

SUPREME COURT OF THE UNITED STATES

THE FRANKLIN SUGAR REFINING COMPANY
Libellant-Appellant

vs.

The Steamship SILVIA, her engines, etc.,
RED CROSS LINE
Claimant-Appellee

PETITION FOR WRIT OF CERTIORARI

WING, PUTNAM & BURLINGHAM
Proctors for Petitioner

UNITED STATES CIRCUIT COURT OF APPEALS 1

FOR THE SECOND CIRCUIT

THE FRANKLIN SUGAR REFINING COMPANY,
Libellant-Appellant,

AGAINST 2

The Steamship SILVIA, her engines, etc.,
RED CROSS LINE,
Claimant-Appellee.

Notice is hereby given that upon the petition of the libellant above named, verified the 31st day of October, 1895, and upon all the pleadings and proceedings herein, we shall, on Monday, the 11th day of November, 1895, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States, at the Capitol, in the City of Washington. 3

New York, October 31st, 1895.

WING, PUTNAM & BURLINGHAM,
Proctors for Libellant. 4

To Messrs. CONVERS & KIRLIN,
Proctors for Claimant.

5 SUPREME COURT OF THE UNITED STATES.

THE FRANKLIN SUGAR REFINING COMPANY,
Libellant,
AGAINST
The Steamship SILVIA, her engines,
6 etc.,
RED CROSS LINE,
Claimant.

And now comes the Franklin Sugar Refining Company, by Harrington Putnam, its advocate, and moves this Honorable Court for a writ of *certiorari* directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, commanding them
7 to certify and return to this Court all the proceedings had in the suit in admiralty lately tried before them between the Franklin Sugar Refining Company, libellant, and the steamship *Silvia*, her engines, etc., whereof Red Cross Line is claimant.

HARRINGTON PUTNAM,
Advocate for Petitioner.

8 TO THE SUPREME COURT OF THE UNITED STATES:

The petition of the Franklin Sugar Refining Company for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the Second Circuit to bring before the Supreme Court of the United States a certain suit in admiralty, wherein it is libellant against the British steamship *Silvia*, whereof the Red Cross Line is claimant, respectfully shows:

FIRST.—On July 14th, 1894, the libellant filed its libel against the steamship *Silvia* in the District Court

of the United States for the Southern District of New York, to recover $4,805.66 for damage to a cargo of sugar shipped on said steamship at Matanzas, Cuba, on February 16th, 1894, and delivered to the libellant in Philadelphia.

SECOND.—The sugar was "damaged by sea water which had got into the ship by a glass port light broken during the voyage. The port was supplied with a proper iron cover or dummy, which was not closed or made fast at the time of sailing, although the hatches leading downward to that compartment were battened down."

Opinion of District Judge, p. 63.

The bill of lading under which the cargo was shipped contained no exception but "the dangers of the seas."

THIRD.—The District Judge held that the ship was guilty of negligence, for which she would have been held liable but for the provisions of the Act of Congress passed February 13, 1893, (27 Stat. at Large, c. 105, p. 445) which, by Section 3, provides:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The District Court found (1) that the ship was negligent in not closing the dummy, and (2) that she "sailed from Matanzas not in a seaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the ports;" but that (3) "in supplying the usual iron covers the owners 'had used due diligence to make the ship seaworthy,'" and were therefore relieved from liability under the act of February 13th, 1893; and (4) that the omission

13 to close the dummy was a fault or error in the management of the vessel within the terms of the act.

A decree was accordingly entered dismissing the libel, but, as the question was a new one, without costs.

FOURTH.—From this decree the libellant duly appealed to the United States Circuit Court of Appeals for the Second Circuit, which, on May 28th, 1895, affirmed the decree of the District Court, with costs.

No mandate has as yet been issued to said District
14 Court.

FIFTH.—The Circuit Court of Appeals said in its opinion, among other things:

"The learned District Judge who heard the cause in the Court below was of the opinion that the steamship was not in a seaworthy condition at the beginning of her voyage, but that her owners had used due diligence to make her so, and consequently that she was exonerated from liability for the injury to the cargo by the provisions of the Act of Congress of February
15 13, 1893, relating to navigation of vessels, commonly known as the Harter Act.

"We are of the opinion that the steamship was not unseaworthy when she began her voyage. Granting that the glass covers were not a sufficient protection for the ports in rough weather, it would have been but the work of a few moments to unbatten the hatch of the compartment and close them with the iron covers."

The Circuit Court of Appeals further held that the case was "controlled by the Act of Congress, and that
16 its provisions relieved the steamship from liability," saying, among other things:

"It is perfectly obvious from the language of this act that Congress intended to relax the severity of the obligation imposed on the ship owner as a carrier of goods by the pre-existing law as it had been declared by the courts."

It cited the cases of the *Edwin I. Morrison* (153 U. S., 199) and the *Caledonia* (157 U. S., 124), as to the

absolute nature of the warranty of seaworthiness, and 17
said:

"In the place of this responsibility the Act of Congress substitutes a less stringent one by declaring that if the owner shall exercise 'due diligence' to make the vessel in all respects seaworthy neither he nor the vessel is to be responsible for damages or loss in transporting merchandise resulting from 'faults or errors in her navigation or management;' nor for losses arising from dangers of the sea.

"Read as a whole the purpose of the act manifestly is, on the one hand, in the interests of the public to 18
prevent carriers from evading responsibility to exercise due diligence in providing seaworthy vessels and in the handling and care of the cargo, and, on the other hand, whenever they have exercised due diligence in these respects, to absolve them from liability for losses arising during the transit from the perils of the sea and from faults or errors in the navigation or management of vessels.

"It has been urged that section 3 is not intended to apply to foreign vessels, but the argument finds no support in the language of the section, and the intention to subject foreign vessels to a measure of respon- 19
sibility which is, as to domestic vessels, regarded by the act as too severe, ought not to be unnecessarily imputed to Congress."

Fifth.—Your petitioner avers that this case is one in which it is proper for this Court to issue a writ of *certiorari*, for the following reasons:

1. The question involved is of great importance and has never been passed upon by this Court. It is of great moment that shipowners and merchants should 20
know how far the obligations of carriers have been relaxed by the recent Act of Congress, if at all.

2. There is no controversy as to the facts. Both the District Court and the Circuit Court of Appeals found the steamship negligent. They differ as to the question of seaworthiness, but the facts on which their respective decisions are based are not in dispute. The District Court found that the "ship sailed from Matanzas not in a seaworthy condition from the fact

21 that the hatches were battened down without the closing of the iron coverings of the ports."

The Circuit Court of Appeals concludes that "it would have been but the work of a few moments to 'unbatten' the hatches and close the port with the iron cover." There is no evidence whatever to support this inference. The hatches were battened down for the express purpose of preventing access to the betweeen decks.

22 3. In a recent case in the English Court of Appeal (Dobell & Co. *v.* S. S. Rossmore Company, Limited, [1895] 2 Q. B. 408) where goods were damaged by sea water which came through a port hole closed by the ship's carpenter before the vessel started on her voyage, but in such an imperfect manner that it was not watertight, the ship relied on the act of Congress of February 13, 1893, which was incorporated in the bill of lading, as a defence. "The appliances for closing the port holes were sufficient and in good order, and the
23 competency of the ship's carpenter for the duties he had to perform was not disputed." The trial judge gave judgment for the plaintiffs, and in the Court of Appeal the defendant's appeal was dismissed, the Master of the Rolls and the Lord Justices Kay and A. L. Smith delivering the judgments.

Lord Esher said:

"It is obvious to my mind, from a consideration of the facts of this case, that the words of the 3d section which limit the owner's liability if he shall exercise
24 due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port. Now, who was the agent at the port who was to look after the ship? If there was an agent there who employed the ship's carpenter he ought to have overlooked the carpenter and seen that the ship was seaworthy. If it was the carpenter who was the agent for this purpose, then it was his duty to see that the ship was seaworthy when she started. If she was not seaworthy when she started, it was the fault either of the agent employed to look

after the carpenter or of the carpenter himself. In either case, there was a person employed by the owner, or on behalf the owner, to see to the fulfillment of the condition that the owner had taken on himself by his contract, that the ship should be seaworthy when she started." 25

In view of this difference between the English Court of Appeal and our own intermediate courts as to the extent of the obligation of seaworthiness, it is important to obtain a decision from this Court on this question as speedily as possible. 26

4. This Court has at the present term granted a writ of *certiorari* in the case of Wupperman *v.* the *Carib Prince*, involving the second section of the act of February 13, 1893. The decision of this Court in that case, however, will leave still unsettled the interpretation of the third section of the act, which is raised by the present application.

In the case of the *Carib Prince* the bill of lading excepted injuries from latent defects. The libellants, in order to overcome this express exception, relied on the second section of the Harter bill, which provides that it shall not be lawful for any vessel transporting merchandise, etc., to insert in a bill of lading any covenant or agreement "whereby the obligations of the vessel owner to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage * * * shall in any wise be lessened, weakened or avoided." 27 28

In the present case it is the ship, not the merchant, which claims the benefit of the Harter bill, relying on the third section of the act, which provides that if the vessel owner shall exercise due diligence to make the said vessel in all respects seaworthy, the vessel shall not be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel.

5. The petitioner believes that this is the first case in which the 3rd section of the Harter Act has been construed by any Circuit Court of Appeals. Many actions are pending in this district and other districts, in which the defence rests upon the validity and interpretation of this third section.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Circuit, to bring this cause before this Honorable Court, and for such other relief as to this Honorable Court may seem just.

THE FRANKLIN SUGAR REFINING COMPANY,
Petitioner.

By WING, PUTNAM & BURLINGHAM,
its proctors.

33

Southern District of New York, City and County of New York. } ss.:

Harrington Putnam, being duly sworn, says that he is a member of the firm of Wing, Putnam & Burlingham, proctors for the libellant, the Franklin Sugar Refining Company, and is authorized to make this verification on his own behalf, the libellant being a corporation of the Commonwealth of Pennsylvania, and absent from this district; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and in the record of the cause in the District Court and in the United States Circuit Court of Appeals.

34

Harrington Putnam.

Sworn to before me this 31st day of October, 1895.

35

James Forrester,
[seal.] Notary Public, Kings County.
Certificate filed in N. Y. County.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted.

36

James K. Hill.